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June 2, 2000

Ms. Magalie Roman Salas, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

RE: Lake Cedar Group's Petition for Expedited Special Relief
Declaratory Ruling, FCC Docket #DA00-764

Dear Ms. Salas:

On behalf of Georgia's 471 municipal governments, I am writing in support of the comments of Jefferson County, Colorado in Docket #DA00-764. As Jefferson County has noted, federal agencies do not have the authority to intervene in local zoning decisions, nor does the Telecommunications Act of 1996 give the Commission authority to preempt local land use authority over broadcast towers.

Local zoning authority is preserved in the federal code (Section 332(c), 47 U.S.C.§332(c)) and is only preempted in limited circumstances for wireless facilities. Television broadcast towers are not included.

Land use and zoning decisions are among the most important functions local governments provide and our long-standing authority to resolve land use and zoning issues would be severely compromised should the Commission attempt to intervene in this instance. GMA urges the Commission to reject the Cedar Lake Group's request to override Jefferson County which we view as an attempt to bypass judicial review of local land use policies. I am sure the Commission appreciates how difficult it would be for a federal agency in our nation's Capitol to be knowledgeable about local land use issues in every city and county in America.

Thank you for your consideration.

Sincerely,

James A. Calvin
Executive Director

JAC/jtc

cc: Cameron Whitman, Director Federal Relations, NLC
Jerry R. Griffin, Executive Director, ACCG

President
Evelyn Turner
Councilor, Columbus

First Vice President
Andrew Harris
Mayor Pro Tem, Decatur

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Board of County Commissioners

Michelle Lawrence
District No. 1
Patricia B. Holloway
District No. 2
Richard M. Sheehan
District No. 3

June 7, 2000

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VIA HAND DELIVERY

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
Designated Counter TW-A325
445 12th Street, SW
Washington, DC 20554

Re: Comments on FCC Public Notice DA 00-764

Dear Ms. Salas:

Please accept for filing the enclosed Reply Comments of the County of Jefferson, Colorado, In Opposition to Lake Cedar Group's Petition For Expedited Special Relief And Declaratory Ruling, which are submitted in response to the FCC Public Notice dated April 10, 2000 and labeled DA 00-764.

We have enclosed one original plus 9 copies of the Comments for distribution to each FCC Commissioner.

If you have any questions regarding this filing, I can be reached at 303-271-8900. Thank you.

Sincerely yours,

Marily Nixon

Marily Nixon
Assistant County Attorney

MN/kh
Enc. (original plus 9 copies)

100 Jefferson County Parkway, Golden, Colorado 80419
(303) 271-6511

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Lake Cedar Group LLC's	)	Docket No. DA 00-764
Petition for Expedited Special Relief	)	
And Declaratory Ruling Seeking	)	
Preempting of a Resolution by	)	
The Board of County Commissioners of	)	
Jefferson County, Colorado	)	

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REPLY COMMENTS OF THE COUNTY OF JEFFERSON, COLORADO IN OPPOSITION TO LAKE CEDAR GROUP'S PETITION FOR EXPEDITED SPECIAL RELIEF AND DECLARATORY RULING

Jefferson County has reviewed those comments that were available to it as of June 7, 2000. The comments do not reflect a wide-spread problem in implementing digital television arising from local government zoning restrictions, or even a problem implementing digital television in the Denver market. Rather, the comments illustrate that Lake Cedar Group's Petition is simply an attempt to induce the Federal Communications Commission (the "FCC") to overrule a single, fact-based zoning decision that Lake Cedar disagrees with. Nowhere does the Telecommunications Act of 1996 authorize the FCC to intervene on a case-by-case basis to implement nationwide digital television. Moreover, even if the FCC had been delegated such authority, preemption would not be appropriate or practical in this case.

This is Not an Appropriate Case for FCC Intervention Because Digital TV Service Exists and is Being Expanded in the Denver Market

Lake Cedar Group seems to suggest that Jefferson County's decision denying its rezoning application for one site on Lookout Mountain is effectively barring access to

digital television to all of the Denver metro area. This is inaccurate. Two TV facilities – the Channel 20 Tower on Mt. Morrison and the Channel 31 Tower on Lookout Mountain -- received special use authorizations from Jefferson County that are broad enough to include digital television. Channel 31 (Fox) has acted on this special use authorization and is currently broadcasting a digital television signal. In addition, the following are in the application or pre-application stage and are currently under county consideration: an application by Channel 4 for installation of a digital antenna on an existing tower; and an informal, pre-application query by Channel 2 to install a digital antenna on an existing tower. Also, two channels (6 and 7) are currently broadcasting a lower-power digital signal from downtown Denver; Channel 6 applied for and received Jefferson County approval to replace a dish on Lookout Mountain to allow the digital signal to be bounced off that dish.

Comments Submitted Suggest a Practical Problem With Lake Cedar Group's Request for Preemption.

The comments submitted by Bear Creek Development Corporation illustrate a logistical problem, in addition to those itemized in the comments filed by Jefferson County to date, that would result from the FCC intervening to promote digital television.[1] The tower referred to by Bear Creek Development Corporation was proposed as an alternative to Lookout Mountain for digital television, yet none of the high-powered television stations broadcasting from Lookout Mountain had agreed to relocate to Mt. Morrison. Alternatively, the tower was proposed as a location for FM antennae that were displaced by removal of the Channel 4 tower. Although Channel 59 wished to place its

[1] By addressing other practical difficulties with exercising federal jurisdiction, Jefferson County does not concede that the FCC has the delegated authority to preempt local land use authority for digital television antennae.

digital antenna on the proposed tower, the expanded height and uses requested by Bear Creek Development Corporation would mainly have supported the existing users of Mt. Morrison, and created capacity for other antennae of all types.

The Bear Creek Development Corporation tower could not have been accurately characterized as a "digital television" tower. It would have been generic vertical real estate that any number of users may have found useful and convenient. Were the FCC to take action that purported to address "digital television" towers, it would be extremely problematic to identify what towers are included within the order. After construction of a tower, the tenants can change. Some towers are constructed with the hope that antennae from a certain market will locate on them, but that hope may not actually be realized. The FCC has no mechanism for accurately distinguishing "digital television towers" from other towers. Any FCC preemption order would inevitably be over-inclusive. The practical result would be preemption of virtually all local zoning restrictions on broadcast towers.

If the FCC instead simply ordered Jefferson County to approve the application filed by Lake Cedar Group, it would be impossible to articulate why that application should be preferred over another application whose proponents also believe that it satisfied Jefferson County's zoning criteria.[2] This difficulty underscores the absence of any statutory or regulatory guidance for exercising federal authority. The result would be not only an undelegated exercise of federal authority, but an arbitrary exercise of federal authority as well.

[2] An FCC order directing Jefferson County to approve the Lake Cedar Group rezoning application would be problematic in itself because the FCC does not have jurisdiction to order local governments to change their zoning classifications.

Another issue raised by the comments is what the burden of proof is on digital broadcasters to demonstrate that federal intervention is warranted. How much difficulty must broadcasters experience to justify federal action? By what criteria would the FCC determine that the local zoning authority has gone beyond the bounds of its legitimate land use authority and obstructed implementation of digital television? Would it be sufficient in the future if existing land use regulations imposed what the broadcasters perceive to be too much expense? Would it be sufficient if local land use regulations caused some reduction in broadcast coverage? Lake Cedar Group has submitted one rezoning application for what it considers to be the ideal site from a business perspective. It is not willing seriously to consider any other site. Should the licensee, by its unilateral action in selecting a site, have the authority to usurp the community's land use plans?

The decision on Lake Cedar Group's application is currently on judicial review. If the state courts uphold that decision, determining that it was not arbitrary and capricious and that Jefferson County's land use criteria are a rational exercise of its statutory land use authority, by what criteria would the federal government decide that that decision must nonetheless yield to federal interests? Neither the Telecommunications Act of 1996 nor any FCC rules indicate what the threshold should be for a decision to exercise federal jurisdiction.

The only solution offered by the Lake Cedar Group is for the FCC to determine that Jefferson County's decision was arbitrary based on the selective facts submitted by Lake Cedar Group. Lake Cedar Group expects the FCC to act based on Lake Cedar Group's own self-serving and selective examination of other broadcasting sites. However, Lake Cedar Group has not offered convincing evidence that federal

intervention is either lawful or necessary to justify this unprecedented intrusion into local affairs.

These issues, together with those stated in the initial comments of Jefferson County, Colorado and the comments submitted on May 10, 2000 require that the FCC deny the Lake Cedar Group petition.

Respectfully submitted,

Claire B. Levy / LW

Claire B. Levy, Esq.
Claire B. Levy, LLC
3172 Redstone Road
Boulder, Colorado 80303
Counsel for Board of County
Commissioners of
Jefferson County and Jefferson County,
Colorado

June 7, 2000

CERTIFICATE OF SERVICE

I hereby certify that on June 7, 2000 I mailed a true and correct copy of the foregoing Reply Comments Of the County Of Jefferson In Opposition To Lake Cedar Group's Petition For Expedited Special Relief And Declaratory Ruling by first-class mail postage prepaid to the following:

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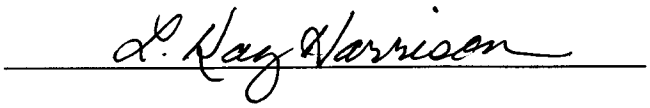

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Lake Cedar Group LLC's	)	DA 00-764
Petition for Expedited Special Relief	)	DA 00-1135
And Declaratory Ruling Seeking	)	
Preempting of a Resolution by	)	
the Board of County Commissioners of	)	
Jefferson County, Colorado	)	

To: The Commission

Reply Comments of Pinnacle Towers, Inc.

Keller and Heckman LLP, on behalf of Pinnacle Towers, Inc. ("PTI") and pursuant to the Commission's Public Notices (DA 00-764 and DA 00-1135), submits these Reply Comments in the captioned proceeding.

The Comments of the County of Jefferson, Colorado, noted that hearings pertaining to the Lake Cedar Group, LLC's ("LCG's") application for rezoning included evidence on the suitability of Squaw Mountain and Eldorado Mountain as alternative locations to the requested site on Lookout Mountain. Protection of the Table Mountain Radio Receiving Zone was cited as a basis for rejecting Eldorado Mountain as a suitable alternative.

PTI, an international site management company with over $1 billion in sites in the United States, has acquired the Eldorado Mountain site and is committed to improving the site as necessary to serve the needs of the Denver-area RF community, consistent with

local land-use concerns. In reply to the Comments of the County of Jefferson, these comments are offered in the nature of an *amicus* filing, so that the Commission will be fully informed with regard to the suitability of the Eldorado Mountain site for use by FM and TV broadcasters.

Propagation Characteristics:

1. Eldorado Mountain provides line-of-site coverage from nearly the Wyoming Border to the north, to Monument Hill to the south. It is the only Front Range site that provides line-of-site coverage to Boulder, Denver and Golden Colorado.

2. The ground elevation at the Eldorado Mountain site is 8,300 feet, 1,040 higher than the ground elevation of the Lookout Mountain site referenced in the Denver DTV Site Investigation, at p. 20.

Land Use Concerns:

1. The nearest residence to the site (other than the former owner's residence, which will be vacated after a transition period) is located at the base of the mountain, over a mile from the site and about 1,700 feet below the site. The nearest "population cluster," also located at the base of the mountain about a mile and a half from the site, and about 1,400 feet below the site, consists of just five residences. Much of the land surrounding the site is owned by the Bureau of Land

Management, the state or County Open Space. The nearest privately owned land not owned by PTI or its assignor has most recently been proposed for development as a quarry, although the rezoning application to permit this use was denied in September or October, 1999 and cannot be re-filed for one year.

2. The plains east of the Eldorado Mountain site, which lie over 2000 feet below the site, have been an area of agricultural and industrial development, including the location of two dynamite magazines, other communications towers, the former Rocky Flats Nuclear Weapons Plant, a concrete plant, a cement batch plant, a saw mill, a gravel quarry and a number of clay pits. The planned Vauxmont project, proposed on a 1,124 acre tract on the east side of Colorado Route 93 at least 3.5 miles from the site, will include commercial, office and industrial development. The approximately 220 acres of multi-family and single family residential development included in the Vauxmont plan is to be at the easternmost end of the project, more than five miles from the site. Open Space and industrial and commercial uses predominate in the area.

3. The Eldorado Mountain site has been developed in a very coordinated manner as a multiple use site. PTI, as the new owner of the site, is committed to continuing the coordinated development of the site so as to minimize land use impacts. PTI would provide the transmitter buildings, auxiliary power supplies, towers, antennas and combiners for multiple FM, TV and DTV broadcast users to install their transmitters, minimizing the number of towers and antennas required to serve a maximum number of users.

Non-ionizing Electromagnetic Radiation Hazard Potential

1. The Eldorado Mountain communications site is isolated, and the terrain around the site is mostly steep and rugged.

2. The nearest residence to the site (other than the former owner's residence, which will be vacated after a transition period) is located at the base of the mountain over a mile from the site, and about 1,700 below the site. The nearest "population cluster," also located at the base of the mountain about a mile and a half from the site, and about 1,400 feet below the site, consists of just five residences. Much of the land surrounding the site is owned by the Bureau of Land Management, the state or County Open Space. The nearest privately owned land not owned by PTI or its assignor has most recently been proposed for development as a quarry, although the rezoning application to permit this use was denied in September or October, 1999 and cannot be re-filed for one year. There is no possibility of residences or other buildings being located "up-slope" from the site and thus being located within the main beam of any antennas located on the site.

FAA Concerns:

1. The Denver DTV Site Investigation prepared for LCG did not identify any FAA issues with respect to the Eldorado Mountain site.

3. The FAA previously issued a No-Objection finding for a 450-foot tower at the Eldorado Mountain site.

Access:

1. The Eldorado Mountain site is accessed via a dirt road. As owner and operator of mountain top sites throughout the United States, PTI rates the road as above average. Several current users of the site access the site with two-wheel drive vehicles, although four-wheel drive vehicles are recommended.

2. The prior owner of the site has resided at the site since 1986 and traveled to and from the site on an almost daily basis, including for his son to attend junior high school and high school daily during the school year.

Ability to Support Auxiliary Facilities

1. The favorable propagation features of the Eldorado Mountain site make it suitable for auxiliary facilities to support broadcast and other users.

Table Mountain Receiving Zone:

1. PTI estimates that the level of DTV signals placed over the Table Mountain Receiving Zone from Eldorado Mountain would only be approximately 2 db greater than from the Lookout Mountain Site.

2. Protection of the Table Mountain Receiving Zone can be accomplished for many stations through the use of a directional antenna, including a directional multiple

station antenna. PTI has conferred with equipment manufacturers who stated that they can produce equipment that will mitigate unwanted signals.

3. PTI has been in communication with the Department of Commerce ("DOC"), which operates the Table Mountain Site, and PTI is committed to continue working with broadcasters, the FCC and DOC to resolve these issues.

Other Considerations:

1. Because PTI's practice as a multiple use site operator is to provide the towers, multiple station antennas and combiners, as well as supporting facilities, to its tenants, the costs to broadcast stations and other users of locating or relocating at the site are reduced. Uses would be consolidated to the minimum number of towers required under PTI's site use practices.

2. Because of the favorable propagation characteristics of the Eldorado site, the operating incomes and values of stations relocating to the site may be improved. The need for broadcast booster stations and land mobile sites may be reduced as licensees locate their primary facilities to the site.

3. PTI's requirement that any new HDTV stations locating at the Eldorado Mountain site transmit via a single multiple station antenna would be consistent with applicable land use objectives. Should existing broadcast transmission facilities relocate to the Eldorado Mountain site, they would also be required to connect to a multiple station antenna installed, owned and maintained by PTI. Should such

relocation of facilities occur, towers in other areas may be eliminated, as applicable land use regulations require removal of towers after six-months of non-use. Thus, there could be a favorable net effect on environmental impact.

4. PTI has not yet sought any modification of its special use permit which may be required to accommodate HDTV and other additional facilities at the Eldorado Mountain site, but believes any additional land use approval which may required and additional development at the site would be consistent with existing and anticipated development in the area. PTI notes that its current special use permit provides for the site to be developed as a multiple use site. There are no residences located in the immediate vicinity of the site, and there is limited opportunity for future residential development in the immediate vicinity of the site with which operation of a multiple use electronic site would be inconsistent.

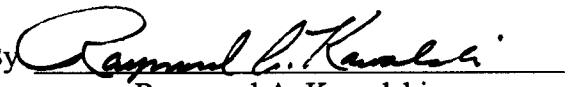
Summary and Conclusion

As demonstrated by these comments, Eldorado Mountain is a viable site for FM and TV broadcasters, including DTV broadcasters. Regardless of the outcome of the present

proceeding, PTI will continue to pursue the development of the site in a way that meets the needs of tenants and that satisfies the concerns of land use authorities and citizens groups.

Respectfully submitted,

PINNACLE TOWERS, INC.

By 
Raymond A. Kowalski
Its Counsel

Dated: June 8, 2000

Keller and Heckman LLP
1001 G Street, NW, Suite 500W
Washington, D.C. 20001
202.434.4100

CERTIFICATE OF SERVICE

I, Regina Hogan, hereby certify that on June 8, 2000 I mailed copies of the foregoing Reply Comments Of Pinnacle Towers, Inc. by first-class postage prepaid mail to the following:

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June 8, 2000

REBECCA H. DUKE
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VIA HAND DELIVERY

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
The Portals, Room TW-A325
445 Twelfth Street, S. W.
Washington, D. C. 20554

Re: In the Matter of Canyon Area Residents for the Environment
Request for Review of Action Taken Under Delegated Authority on a Petition for an Environmental Impact Statement
DA 00-764

Dear Ms. Salas:

Transmitted herewith, on behalf of Lake Cedar Group LLC, are an original and four copies of its reply comments in the above referenced proceeding.

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

If you have any questions, please contact the undesigned.

Very truly yours,

HOLLAND & KNIGHT LLP

Rebecca H. Duke

cc: Arthur B. Goodkind, Esquire
Todd D. Gray, Esquire
Howard F. Jaeckel, Esquire
David P. Fleming, Esquire

Courtesy Copy: Bruce Romano, Esquire
Roz Allen, Esquire

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Canyon Area Residents for the Environment	)	DA 00-764
Request for Review of Action Taken Under	)	
Delegated Authority on a Petition for	)	
an Environmental Impact Statement	)	

To the Commission:

REPLY COMMENTS OF LAKE CEDAR GROUP LLC ON ITS PETITION FOR EXPEDITED SPECIAL RELIEF AND DECLARATORY RULING

Edward W. Hummers, Jr.
Rebecca H. Duke
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Counsel for
Multimedia Holdings Corporation

June 8, 2000

TABLE OF CONTENTS

SUMMARY

These Reply Comments are filed in response and rebuttal to the Comments filed in this proceeding by Jefferson County, Canyon Area Residents for the Environment and other entities and individuals. The underlying basis for the Lake Cedar Group LLC's ("LCG") request for preemption has been previously briefed to the Commission and need not be recited.

Commenting parties raised a variety of issues questioning the location of the LCG tower at the Lookout Mountain Antenna Farm and the availability of alternate sites for the tower. In this Reply, we respond to these questions and explain in greater detail the technical issues at play in determining the tower location, including interference, collocation, the channel allotment scheme, the Table Mountain Radio Receiving Zone, translators and repeaters, Federal Communications Commission ("FCC") regulations and coverage and service losses. In combination, these technical issues and factors effectively require that the tower be constructed at the Lookout Mountain Antenna Farm.

In response to Comments that the FCC cannot preempt a local zoning decision, the Reply focuses on the FCC's authority to preempt the Jefferson County denial of zoning under its statutory primary jurisdiction over communications and prior instances where the FCC has preempted local government regulation (including court decisions where such preemption has been upheld). Due to the County's zoning denial, LCG is now in the position of being unable to comply with both the federal regulations and the County's local zoning decision. FCC

preemption is necessary, and authorized, to resolve this conflict and allow the members of LCG to move forward with providing digital television service in accordance with Congressional and FCC directives. The FCC has the expertise to examine the technical issues underlying some of the cited reasons for the denial of zoning (such as allegations that the radio frequency radiation limits will be exceeded and that alternate sites exist for the tower) and determine, in accordance with the technical data, that the zoning denial does indeed conflict with federal regulations and issue a limited order preempting the zoning denial and directing that the application for zoning be deemed approved.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Canyon Area Residents for the Environment	)	Docket No. DA 00-764
Request for Review of Action Taken Under	)	
Delegated Authority on a Petition for	)	
an Environmental Impact Statement	)	

To Chief, Mass Media Bureau:

REPLY COMMENTS OF LAKE CEDAR GROUP LLC ON ITS PETITION FOR EXPEDITED SPECIAL RELIEF AND DECLARATORY RULING

Lake Cedar Group LLC ("LCG") and each of its members, Group W/CBS Television Stations Partners, licensee of KCNC-TV; McGraw-Hill Broadcasting Company, Inc., licensee of KMGH-TV; Rocky Mountain Public Broadcasting Network, Inc., licensee of KRMA-TV; Twenver Broadcast, Inc., licensee of KTVD; and Multimedia Holdings Corporation, licensee of KUSA-TV, collectively ("Broadcasters") and individually, hereby respond to the comments filed by Jefferson County, Colorado ("Jefferson County"), Canyon Area Residents for the Environment ("CARE"), other organizations and entities, and numerous residents of the Golden, Colorado area in response to the petition for expedited special relief and declaratory ruling (the "Petition") filed by Broadcasters on November 2, 1999. In the Petition, Broadcasters requested that the Commission issue an order declaring that the Board of County Commissioners of Jefferson County, Colorado, (the "County" or "County Commissioners") Resolution No. CC99-427, dated August 3, 1999, which denies the application of LCG to rezone certain property located in the

antenna farm located on Lookout Mountain to permit the construction of DTV facilities by Broadcasters (the "County Resolution")[1] is preempted pursuant to the Supremacy Clause because it unreasonably frustrates important federal policies and because it places Broadcasters in a position in which compliance with both state and federal regulations is impossible.

OVERVIEW

As explained more fully in the Petition, the Lookout Mountain Antenna Farm has been used as a transmitting site for Denver television stations since the mid-1950s, and the transmitting facilities of virtually all of the television stations in the Antenna Farm have been legal nonconforming uses since 1955. In 1985, Jefferson County adopted a Telecommunications Land Use Plan that tightened the nonconforming use provisions of the county's zoning code and placed a strong emphasis on tower consolidation as a policy objective.

In response both to the federally-mandated implementation of digital television ("DTV"), which will require the construction of new facilities by all current television licensees, and as a direct result of the County's Telecommunications Land Use Plan, Broadcasters put aside their normal competitive relationships and formed a consortium to investigate alternative sites and the feasibility of constructing a consolidated communications tower. After

---

[1] The Board of County Commissioners of Jefferson County on July 13, 1999 by unanimous voice vote denied the LCG application to rezone the land upon which the LCG Tower is to be constructed (Application #98015154RZP1). By majority vote on August 3, 1999, the Board adopted Resolution No. CC99-427 denying the LCG zoning application. On August 12, 1999, LCG filed a complaint in the Colorado District Court, County of Jefferson, Case No. 99CV2007 appealing the County's action. The appeal remains pending.

careful investigation, Broadcasters determined that the Lookout Mountain Antenna Farm would provide the most desirable location in terms of both technical and business considerations. Consequently, Broadcasters aggregated 79.5 acres of land on the east slope of Lookout Mountain for the purpose of constructing such a facility.

On July 1, 1998, well over a year in advance of the FCC-mandated deadline for the implementation of DTV in the Denver market, and in reliance on the assurances of County Commissioners and staff that the LCG proposal would be acceptable, LCG filed an application to rezone its property as a Planned Development ("PD") District to permit the construction of a new consolidated multi-user telecommunications tower and a related transmitter building. The proposed tower would result in the immediate removal of two existing towers, one of which is equal in height to the proposed tower. Moreover, an additional two towers would be removed at the end of the DTV transition period, and it is expected that many FM stations located in the Lookout Mountain Antenna Farm on short towers with high levels of RFR emissions would choose to relocate to the proposed LCG tower. This would permit the removal of additional towers. Therefore, the proposed tower would replace at least four towers, and likely many more.

The Jefferson County Planning Commission, the professional body that makes recommendations on zoning matters to the elected officials of the Jefferson County Board of County Commissioners, voted 6 to 1 in favor of the LCG proposal despite a public outcry based on a campaign of misinformation and hysteria waged

by a group calling itself Canyon Area Residents for the Environment ("CARE"). Ultimately, faced with alarmed constituents and not-so-subtle threats of removal from office in the event that the LCG proposal was approved, the County Commissioners voted 3 to 0 to deny the application. The County Resolution, a copy of which is attached to the Petition, provides very little indication of what evidence or reasoning supported the County's decision.

As a direct result of the County's decision, those Broadcasters who are affiliates of ABC, CBS, and NBC have been unable to comply with the FCC's November 1, 1999 deadline for constructing their DTV facilities. Further, as demonstrated below, the forced placement of Broadcasters' facilities in a location other than the Lookout Mountain Antenna Farm will severely impair service to television viewers in the Denver market—which includes the viewers in some 57 counties located in four states—because the FCC's own allotment scheme effectively joins Broadcasters to one another, and in turn to the Lookout Mountain Antenna Farm. The Petition, these Reply Comments, and the study entitled "Denver DTV Site Investigations" ("Browne Report")[2] all demonstrate that the County's decision has not only rendered compliance with federal regulations impossible, but will also,

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[2] In addition, the attached Response to CARE Filing ("Browne Response"), prepared by John F.X. Browne, P.E., provides further evidence that demonstrates the conflict between federal and local regulation. The Browne Response fully rebuts the biased and unscientific Alternative Analysis of DTV Tower Sites in Denver Area filed by Alfred R. Hislop, Ronal W. Larson, and James A. Martin (the "HLM Filing"). In addition to questionable analysis of the technical issues presented, the HLM Filing is fundamentally flawed in that it misses the basic point of the Petition, *i.e.*, that there is a conflict between federal and local interests as a result of limitations imposed on Broadcasters by the FCC's DTV allotment scheme, technical factors, and the loss of service to the public that will occur if Broadcasters are forced to locate their DTV facilities elsewhere.

if left undisturbed, severely hamper federal policies supporting the provision of free, over-the-air broadcasting to all Americans.

LCG recognizes and accepts the FCC's general policy of exercising great restraint in intervening in local land use disputes. In those infrequent cases in which the Commission is asked to intervene, however—and this is, to our knowledge, the only DTV siting case in which such a request has been made—the Commission has a duty to balance carefully the specific local impact asserted by a local authority as a basis for denying a tower siting proposal as against any special circumstances that require federal preemption in order to effectuate important national telecommunications policies. This duty is even clearer in a situation where, as here, only the FCC has the requisite knowledge to give proper weight to the various factors that must be considered because technical issues within the exclusive jurisdiction of the FCC and legal issues are inextricably linked. The uniqueness of this request for limited preemption is further demonstrated by the fact that Broadcasters seek preemption of a zoning decision involving modified uses at an existing antenna farm and not a change in character or use of the geographic area in question.

ARGUMENT

I. A CONFLICT EXISTS BETWEEN THE COUNTY RESOLUTION AND FEDERAL LAW THAT REQUIRES INTERVENTION BY THE FCC.

Many of the parties who have filed comments in this proceeding have argued that there is no conflict between federal law and the Jefferson County Resolution in this case, and that the County Resolution does not prevent the implementation of

DTV in the Denver market. *See, e.g.*, CARE Reply Comments at 11-12. These parties argue that Jefferson County's decision merely prevents LCG from locating its member stations' facilities in the most "convenient" location, or even that the denial is somehow Broadcasters' fault, while for the most part ignoring the myriad technical difficulties involved in relocating Broadcasters' DTV facilities to a substantially different location from that used by the FCC in the allotment of DTV channels in the Denver market.[3] As demonstrated below, these contentions are false because, but for the County's denial of LCG's request, its members could be offering DTV service to the public, and because the Lookout Mountain Antenna Farm is the only site at which Broadcasters can feasibly locate their DTV facilities.

LCG's preemption petition demonstrates that Jefferson County essentially ignored overwhelming record evidence that LCG's joint tower proposal would have no adverse impact. In these reply comments, we shall focus on the contention of several commenting parties that the FCC's digital television transition policies may be accommodated by requiring the LCG stations to construct their digital stations at a different site. As we shall show, there are special engineering considerations that make such a site change unfeasible and that make preemption of Jefferson County's land use decision a necessity in order to fulfill the congressionally mandated goal of bringing digital television service to all parts of the United

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[3] These parties even naively gloss over the technical difficulties by raising the hypothetical question of "What if Lookout Mountain did not exist?" Of course, if Lookout Mountain did not exist, Broadcasters' analog facilities would have long ago been located in a different location, and Broadcasters would still need to collocate their DTV facilities in that hypothetical location to avoid the same interference problems and other technical issues that are involved in this real-world proceeding.

States.[4] Because the unique circumstances that exist in the Denver market flow directly from the Commission's own DTV channel allotment plan, they require that the Commission accept a special responsibility to resolve the Denver land use impasse.

A. A Conflict Exists Between Federal Law and The County Resolution Because No Viable Alternative Sites Exist for Providing DTV Service to the Denver Market.

The commenting parties, in an effort to demonstrate that no conflict exists between federal law and the County Resolution, rely on the mistaken belief that Broadcasters can provide a level of service that is acceptable under FCC rules and policies from any site that is not in their back yard. *See* CARE comments at 11-12. These comments uniformly demonstrate a total lack of understanding of the degree to which technical constraints imposed by the FCC's allotment plan limit the locations at which Broadcasters may provide DTV service to viewers in the Denver market. They also ignore the harm to the public interest that would result from any loss of service. As shown below, there is no existing site[5] at which Broadcasters may locate their DTV facilities that will allow Broadcasters to provide an acceptable level of service.

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[4] Denver is this country's 18th largest television market. The inability of LCG to move forward with its proposal has already delayed the initiation of digital service by five Denver stations, three of which were required by the Commission's Rules to have commenced digital broadcasting by November 1, 1999. Such delays also imperil an equally important part of the national digital television scheme adopted by Congress, which is the FCC's mandate to implement an efficient new television allocation system that will permit a substantial portion of the spectrum presently used for television broadcasting to be auctioned by the government for diverse communications purposes.

[5] As shown below, only "existing telecommunications sites" need be considered under the local zoning regulation. *See infra*, note 10.

1. The FCC's Channel Allotment Scheme Effectively Requires the Collocation of Nearly All Denver TV Facilities and Therefore Precludes Moving the Denver DTV Facilities to a New Site.

We start with the fact that virtually all Denver market television stations broadcast their analog signals from sites that are either at the Lookout Mountain Antenna Farm or the Mount Morrison electronic site. These two sites are only 4.5 miles apart and are therefore close enough to permit the use of first-adjacent DTV/analog channels at either or both locations.[6] The commercial and non-commercial full-service analog stations presently broadcasting from Lookout Mountain or from Mount Morrison include those on Channels 2, 4, 6, 7, 9, 14, 20, 31, and 59.

As the Commission recognized in a previous opinion on the Denver DTV matter, the Lookout Mountain site is a *de facto* antenna farm at which the grouping of numerous transmission towers greatly decreases hazards to air navigation. *See Canyon Area Residents for the Environment Request for Review of Action Taken Under Delegated Authority on a Petition for an Environmental Impact Statement*, 14 FCC Rcd 8152, ¶ 2 (1999) ("CARE Request for Review"). This was an important reason why the Denver TV stations originally built their towers on Lookout Mountain in the mid-1950's, a time at which there were few residences in the vicinity of the towers. The other important reasons for locating the Denver stations on Lookout Mountain were that it is by far the best available site for providing line-of-sight television service to the Denver market and because a common location for

[6] While Mount Morrison is only slightly less desirable than Lookout Mountain in terms of providing coverage to the entire Denver market, an effort by others to obtain Jefferson County authorization for installation of DTV antennas on Mt. Morrison has been denied by Jefferson County and is no more successful than has LCG's effort to build its joint tower on Lookout Mountain.

all of the stations avoided viewer antenna orientation problems with respect to any of the stations.

In making its digital channel allotments for the Denver market, the Commission sought to maximize allocation efficiency by making extensive use of channels that are first-adjacent either to other DTV allotments or to the channels of operating analog stations.[7] DTV channel allotments for the Denver market include Channels 15, 16, 17, 18, 19, 32, 34, 35 and 43. Together with the channels now in use by analog stations on Lookout Mountain and Mount Morrison, the first-adjacent channel analog stations and DTV channel allotments at Lookout/Morrison include Channels 14, 15, 16, 17, 18, 19, 20, 31, 32, 34 and 35. This allotment of adjacent channels would result in the following problems with respect to any substantial change in the proposed DTV transmitter sites for any of the LCG stations.

(1) Owing to the adjacency of the Channel 19 DTV allotment to analog Channel 20, KTVD must locate its digital facilities for Channel 19 near those for its analog operation on Channel 20. KTVJ (which is not an LCG member) must likewise locate its digital Channel 15 facilities near its Channel 14 analog facilities.

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[7] Owing to interference considerations, first-adjacent NTSC stations must be separated from each other by at least 95.7 km (VHF stations) and 87.7 km (UHF stations), 47 C.F.R. § 73.610(c)(1), making first-adjacent channel NTSC assignments in the same market generally impractical. Digital stations have more benign interference characteristics, and this has made it possible for the Commission to increase the efficiency of its DTV allotment scheme by making adjacent channel allotments in the same market. Adjacent DTV/NTSC channel allotments can only exist without mutual interference, however, if the signal levels of adjacent channel stations received at a viewer home are not significantly disparate and even DTV/DTV first adjacent channel allotments cannot be located at substantial distances from each other without creating mutual interference. To avoid such signal strength disparities at viewers' receivers, the adjacent-channel stations generally broadcast from the same site or from nearby sites, a fact of critical significance for this case. As noted above, a grouping of the Denver DTV stations at the Lookout/Morrison sites places all transmitting facilities close enough to each other to permit first-adjacent channel allotments.

Neither digital facility could therefore be moved any substantial distance from the Lookout/Morrison area unless the analog stations were also to be moved, which could not be done without seriously impairing the analog service of each station.[8]

(2) Similarly, KCNC-DT, the digital station authorized on Channel 35, cannot move a substantial distance away from Lookout Mountain without resulting in some interference occurring between KCNC-DT and KWGN-DT, operating on Channel 34. But the permittee of KWGN-DT is not a member of LCG and is presently seeking authority to construct its Channel 34 digital station at the existing Lookout Mountain Antenna Farm site of KWGN-TV, the licensee's Channel 2 analog station. Should KWGN succeed in its effort (as has the licensee of KDVR-DT which successfully obtained authority to construct KDVR-DT at the Lookout Mountain Antenna Farm site of KDVR(TV)), any move of KCNC-DT on its Channel 35 allotment away from Lookout Mountain will result in interference if the sites are too widely separated.

(3) As noted above, different zoning considerations have permitted the licensee of KDVR-DT to construct its Channel 32 DTV operation at the KDVR Channel 31 analog station site at the Lookout Mountain Antenna Farm. An appeal of the Jefferson County grant of authority to install the KDVR-DT facilities was

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[8] Lookout Mountain is a superior site in terms of Denver coverage and the Lookout/Morrison area is the direction toward which all Denver viewers' antennas are presently oriented. The licensees of KTVD and KTVJ (and of all other analog stations presently sited in the Lookout/Morrison area) therefore have every reason to maintain their existing analog operations at the Lookout/Morrison area. Moreover, the licensee of noncommercial station KRMA-TV could not move its Channel 6 analog operation from Lookout Mountain because it would face substantial interference problems if the station cannot remain co-located with two noncommercial FM stations that operate from Lookout Mountain. As noted below, it may not be possible to move the co-located FM stations to a different site owing to FM spacing constraints.

taken by CARE and the court affirmed the County's action. KDVR-DT is thus the only full-power commercial Denver DTV station presently in operation.[9] Were the other DTV stations to be constructed at a different site, Denver viewers seeking to receive digital television from all Denver stations would be required to acquire antenna rotors to orient their antennas in at least two different directions. *See* Browne Report at 10.

In sum, the Commission's DTV channel allotment scheme for the Denver market precludes any substantial change in the transmitter sites of the LCG stations. Such a move would result in potential interference between the KTVD's analog and digital operations; between KTVJ's digital operation and a channel 16 digital facility (if KTVJ's digital station is constructed on Mt. Morrison) or between KTVJ's digital and analog stations (if KTVJ-DT should be constructed at a substantially different location, close to that of Channel 16); and between the digital operations of KWGN-DT on Channel 34 and KCNC-DT on Channel 35 if KCNC-DT's site were moved to a substantially different location. Moreover, many viewers in the Denver market would only be able to view all digital stations through the use of antenna rotors (a difficulty that would be further compounded were any of the existing analog stations to move to a site at a substantially different location).

In an attempt to demonstrate that the Lookout Mountain Antenna Farm is no more desirable than any other site, Jefferson County devotes a great deal of

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[9] Noncommercial station KRMA-DT operates a medium-power temporary facility from atop a tall building in Denver under an STA. Station KMGH-DT operates a low power digital station from its Denver studio location under an STA granted by the Commission. That operation is essentially a demonstration project, however, and provides very little coverage of the Denver market.

comment to a discussion of old FCC proceedings involving the placement of analog facilities at the Lookout Mountain Antenna Farm. *See* CARE Comments at 24-28. This proceeding involves the placement of digital facilities on adjacent frequencies, which is a separate technical issue. Put simply, this proceeding is not only about the intrinsic advantages of Lookout Mountain—although it does provide superior coverage—but is equally about the degree to which the FCC's DTV allotment scheme precludes Broadcasters from locating their DTV facilities at someplace other than the Lookout Mountain Antenna Farm. The prior FCC proceedings clearly did not address this issue, as these proceedings took place well before the advent of digital television and the reallocation of the television spectrum.

2. Other Technical Issues Render Alternative Sites Unacceptable.

The Browne Report also demonstrates that other technical issues, which are unique to the Denver market, render alternative sites unacceptable. For example, Eldorado Mountain, a site suggested by some commenting parties as a viable alternative, is closer to the Table Mountain Radio Receiving Zone ("Table Mountain") than is the Lookout Mountain Antenna Farm. Table Mountain is a research facility operated by the National Telecommunications & Information Agency, and Institute for Telecommunication Sciences, the National Oceanographic & Atmospheric Administration, and the National Institute for Science & Technology.

The FCC accords Table Mountain a special status concerning interference from radio transmission devices. *See* 47 C.F.R. § 1.924(b). While the stations

operating from the Lookout Mountain Antenna Farm have been "grandfathered" under the FCC's rules with respect to Table Mountain, these stations would have to apply on a case-by-case basis for any new transmitting location. As Eldorado Mountain is closer to Table Mountain than is the Lookout Mountain Antenna Farm, even assuming that Broadcasters could receive authorization to maintain their existing signal levels over Table Mountain, they would be forced to reduce their operating power in order to maintain the status quo.

Squaw Mountain, another site suggested by certain commenting parties, also presents substantial technical difficulties in addition to those discussed above regarding adjacent channel interference and antenna orientation issues. Terrain shadowing from this location would severely impair the service that Broadcasters could provide to viewers in the Denver market. *See* Browne Report at 29. Nearly 97,000 residents of Boulder County would lose service, and over 30,000 residents of Larimer County would also lose service. *See* Browne Report, Table B.

In addition, short-spacing problems faced by the noncommercial FM stations that are currently colocated with KRMA-TV (Channel 6) at the Lookout Mountain Antenna Farm would likely prevent a move to Squaw Mountain by any of these stations. Interference issues dictate that the Channel 6 facilities remain colocated with those of the noncommercial FM stations, so it is unlikely that Channel 6 would leave Lookout Mountain even if forced to construct its DTV facilities elsewhere—in other words, while the LCG proposal would result in the consolidation of towers by removing KRMA-TV's Channel 6 tower, the County's action would result in the

proliferation of towers by requiring that a new tower be constructed to host KRMA-TV's DTV facilities while leaving the old tower intact. *See* Browne Report at 29-30.

Finally, the existing Squaw Mountain antenna tower is only 250 feet above ground. This would raise significant concerns as to whether Broadcasters could maintain their authorized levels of service (which would still result in a loss of service to over 131,000 viewers) without exceeding ground-level radiation limits. Obtaining the necessary authority to construct a sufficiently tall tower on Squaw Mountain is problematic.

3. Translators and Repeaters Do Not Mitigate the Loss of Service.

Certain commenting parties have argued that Broadcasters could use translators and/or repeaters to mitigate the loss of service that would occur as a result of the placement of their DTV facilities at a location other than the Lookout Mountain Antenna Farm. The most obvious flaw in this suggestion, technical issues notwithstanding, is that each translator or repeater would require a relatively high site, with a line of sight to the area to be served, and each would require local zoning or other approvals. Given the current misinformed frenzy over broadcasting towers in the Denver area, the likelihood of obtaining such approvals for multiple sites appears quite remote. Multi-site construction in someone else's back yard is hardly the answer to the land use objectives raised by those opposed to LCG's tower consolidation proposal at the Lookout Mountain Antenna Farm.

Moreover, the technical problems with using translators or repeaters are substantial. If Broadcasters were forced to locate their DTV facilities at a site other

than the Lookout Mountain Antenna Farm and to serve shadowed areas by translators, this would necessitate a translator channel for each Broadcaster, or a total of five channels per site. Multiple sites would be required to serve the extensive areas shadowed in Boulder, Douglas, Jefferson, and Larimer Counties. However, as the Commission is well aware, broadcast spectrum has become increasingly scarce and translator channel displacement has already taken place in the Denver market. Considering restrictions on distance separation and interference over Table Mountain and the need to protect the allotted analog and digital television channels as well as existing translator and low power television stations, it would be virtually impossible to find a sufficient number of channels available to adequately serve the shadowed area. *See* Browne Report at 13-14.

Repeaters do not resolve the technical difficulties, either. As demonstrated in the Browne Report, on-channel analog repeaters have been used successfully only in places where the parent station's signal is virtually absent, such as island cities in Hawaii that are separated by tall mountains. *See* Browne Report at 13. Otherwise, the parent station and repeater are likely to cause interference to one another. *See id.* While digital on-channel repeaters may be possible in theory, these have not yet been successfully used except in locations such as Hawaii. *See id.* Therefore, the loss of service that would result from DTV operations from other than the Lookout Mountain Antenna Farm cannot be mitigated by either translators or repeaters.

4. Relocating the DTV Facilities of LCG Member Stations Would Result in Service Losses Well Above Levels Permitted by the FCC.

The FCC's rules require that any DTV permittee seeking to locate its facilities outside a five-kilometer radius of its analog facilities must conduct an interference study and demonstrate to the Commission that such a move would be in the public interest. *See* 47 C.F.R. §§ 73.622(d), 73.623(c). Given the technical difficulties explained above and in greater detail in the Browne Report, it is clear that any placement of Broadcasters' DTV facilities in a location substantially different from the Lookout Mountain Antenna Farm will result in a considerable loss of service.

For example, the Browne Report shows that relocating Broadcasters' DTV facilities to Squaw Mountain would result in a loss of service to over 131,000 viewers.[10] While certain commenting parties apparently base their arguments against the Petition on the assumption that Broadcasters must only provide "some" service, this assumption is based on neither law nor policy. In fact, it is a longstanding FCC policy that any proposed loss in service is *prima facie* inconsistent with the public interest and is only permissible if the broadcaster can demonstrate that other factors would outweigh the presumed harm (*e.g.*, a net increase in the number of viewers receiving their first or second TV signal). *See Hall v. FCC*, 237 F.2d 567 (D.C. Cir. 1956); *West Michigan Telecasters, Inc.*, 22 FCC

[10] While "Site D" in the Browne Report would result in a loss of service to roughly 57,000 persons, this site is not developed and would require rezoning. As discussed below, this alternative site need not be considered under the Jefferson County zoning regulations, as it is not an "existing telecommunications site." *See* Zoning Regulations, § 15(F)(2)(b)(1). As Squaw Mountain is the most feasible of the developed sites analyzed in the Browne Report, the figures for loss of service assume Squaw Mountain as the new DTV site.

2d 943 (1970), *aff'd sub nom. West Michigan Telecasters, Inc. v. FCC*, 460 F.2d 883 (D.C. Cir. 1972) (denial of short-spacing waiver request based on loss of third Grade B signal to 49,719 viewers)[11]; *Elba Development Corp. (KQTV(TV))*, 96 FCC 2d 393 (Chief ALJ, 1983), *aff'd* 96 FCC 2d 376 (Rev. Bd. 1984) (denial of tower relocation request based on loss of only Grade B signal to 10,227 persons and only ABC service to 9,936 persons); *Amendment of Table of Allotments TV Broadcast Stations (Pueblo, CO)*, 16 Comm. Reg. (P & F) 610 (1999) (denial of short-spacing waiver request based in part on loss of only commercial TV service and only NBC network service to 23,012 viewers). The loss of service that will occur if Broadcasters must relocate their facilities provides further evidence that the County action has frustrated important federal policies.

In sum, the commenting parties who contend that an appropriate resolution of this matter is simply to require the LCG stations to construct their DTV facilities elsewhere are wrong. If the LCG DTV stations are required to build elsewhere, different DTV channels would have to be found and allotted to overcome interference, two analog stations would be required to move to extremely disadvantageous sites, Denver viewers would not be able to view a complete complement of either analog stations or digital stations without acquiring antenna

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[11] CARE simplistically argues that Broadcasters may simply request waivers of any FCC rules that might preclude the location of Broadcasters' DTV facilities at a site substantially different from Lookout Mountain because "[i]t is not extremely difficult to get short spacing waivers from the FCC." CARE Comments at 29. This disregards the fundamental requirement that an applicant for a waiver of the FCC's rules must demonstrate that the waiver is in the public interest. *See* 47 C.F.R. § 1.925(3)(i). Any loss of service is presumptively contrary to the public interest, and CARE has failed to provide any basis in law or policy that would justify a waiver that would result in a loss of service of the magnitude predicted here.

rotors, and there would no longer be a single antenna farm for all of the Lookout Mountain licensees. Operation from an alternative site would result in a loss of service to a significant number of viewers. These results would be contrary to the public interest and would be beyond the control of the LCG stations. Most importantly, such an outcome would represent a serious impairment of important federal policies by local officials serving only the parochial interests of a small number of individuals.

The consequences described above flow directly from the Commission's digital TV allotment plan. They will necessarily occur unless the LCG stations are permitted to construct at the Lookout Mountain Antenna Farm, which was used by the FCC as the assumed site for the LCG stations' DTV allotments. The Commission thus has a special obligation in this case to take such steps as may be necessary to permit the LCG joint tower to go forward. The Commission should do so unless there is strong record evidence that preemption of Jefferson County's land use decision would have severely adverse local consequences. And as we have previously shown, the record in this case includes no such hard evidence.

B. Jefferson County's Actions Conflict with Federal Law Because the County "Finding" Concerning Regulation of Radio Frequency Radiation Has Been Preempted by the FCC.

In the County Resolution, one of the "findings" of the County cited as justification for the denial of the LCG proposal was that the proposal did not demonstrate that its facilities would comply with County RFR limits, which are identical to those of the FCC. *See* County Resolution, ¶ 5. In fact, concern over past

RFR problems at the Lookout Mountain Antenna Farm played a significant role in CARE's campaign of misinformation and hysteria, which fueled the public outcry that led to the denial of LCG's request. As a result, numerous residents of the area surrounding the Lookout Mountain Antenna Farm have filed comments stating that the proposed LCG tower's allegedly greater levels of RFR "was cause for great anxiety." *See, e.g.*, Comments of Howard G. Denton; Comments of David Castanon; Comments of Buchanan Neville Stouffer, P.C. (three examples of the dozens of identical form letters filed in this proceeding by Colorado residents). However, as CARE correctly points out, "[i]ncompetent evidence, repeated many times by many people, is still incompetent." CARE Comments at 5.

The FCC has already determined that despite previous RFR problems[12] at the Lookout Mountain Antenna Farm, Broadcasters have successfully remedied these past problems. *See CARE Request for Review*, ¶ 9. In its decision, the Commission pointed out that any willful misrepresentation regarding RFR compliance or other matters would result in serious consequences for Broadcasters, and that Broadcasters would be required to certify future compliance before they commenced operations from the proposed LCG tower. *Id.* at ¶ 19.

The County's "finding" regarding RFR is in direct conflict with the FCC order because this finding was clearly based on past RFR problems at the Lookout Mountain Antenna Farm rather than the FCC's finding of compliance and the condition of future compliance imposed upon Broadcasters. There is no other logical

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[12] After its own investigation, the FCC concluded that RFR problems at the Lookout Mountain Antenna Farm resulted from some of the FM stations located therein and not from television station transmissions. *CARE Request for Review*, ¶ 5.

explanation for the County's "finding" that LCG had failed to demonstrate that its proposed tower would comply with RFR limits, as LCG presented uncontroverted scientific evidence that the proposed tower would reduce current RFR levels. With regard to future operations from the proposed LCG tower, the Commission's imposed condition of compliance with the RFR guidelines totally negates any possibility that the LCG proposal would not comply with the County's RFR limits. As the County's "findings" conflict with FCC determinations regarding RFR at the Lookout Mountain Antenna Farm, these "findings" are preempted pursuant to the Supremacy Clause and the FCC's statutory jurisdiction over interstate communications. *See* Part II, below.

II. THE FCC IS THE PROPER FORUM FOR THIS PROCEEDING.

A. The FCC Has the Legal Authority To Take the Action Requested.

The FCC has the authority, pursuant to the Federal Communications Act of 1934 (as amended), 47 U.S.C. § 151 *et. seq.* ("FCA") and regulations promulgated thereunder, to take the action requested and preempt the local zoning authority's decision to deny zoning for a digital transmission tower. Jefferson County and CARE, the primary interested parties, both argue that federal preemption is not authorized on the basis of conflict because "no conflict" exists (*See*, Jefferson County Initial Comments at 14; CARE Comments at 11). Although LCG cannot cite an express provision preempting state or local regulation of DTV tower siting (thus creating a *per se* conflict), an examination of the federal regulatory scheme illustrates that a conflict does exist and the practical effect of the County's zoning

denial is to interfere with, burden, and limit the provision of interstate radio communications and more specifically the implementation of DTV as mandated by Congress and the Commission.

1. The Commission Derives its Authority to Act from its Statutory Jurisdiction Over Interstate Communications.

Congress created the FCC in 1934 to regulate "communication by wire and radio so as to make available . . . to all the people of the U.S. a rapid, efficient, nation-wide and world-wide wire and radio communication service." 47 U.S.C. § 151. The purpose of the FCA is "to centralize authority heretofore granted by law to several agencies" in the FCC and to "grant additional authority with respect to interstate and foreign commerce in wire and radio communication" to the FCC. 47 U.S.C. § 151. Section 153(b) extends the FCC's jurisdiction over interstate radio communications not only to the transmission of "writing, signs, signal, pictures, and sounds of all kinds" by radio but also to "all instrumentalities, facilities, apparatus, and services . . . incidental to such transmissions." 47 U.S.C. § 153(b). The FCC has the sole authority over almost every aspect of broadcasting.[13] Congress intended the FCC to possess exclusive authority over technical matters related to broadcasting. This authority is embedded in the FCC's broad authority to develop a

[13] For example, pursuant to 47 U.S.C. § 303(d), the FCC shall "determine the location of classes of stations or individual stations"; §303(e) directs the FCC to "regulate the kind of apparatus to be used with respect to its external effects and the purity and sharpness of the emissions from each station and from the apparatus therein"; the FCC is to "make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this chapter" pursuant to § 303(f). Under § 303(h), the FCC has the authority "to establish areas or zones to be served by any station." Finally, pursuant to § 303(c), the FCC has the authority to "make such rules and regulations and prescribe such restrictions and conditions . . . as may be necessary to carry out the provisions of this chapter . . . ."

comprehensive national regulatory system governing telecommunications. In accordance with this authority, the FCC has issued several directives pertaining to DTV.[14] These regulations follow the Congressional mandate and direct the implementation of advanced television services, allot DTV frequencies and establish deadlines for the transition from analog to digital service.[15]

2. LCG Cannot Comply with Both the Federal Mandate and the County's Actions.

Of the various forms of federal preemption, the most pertinent to the pending Petition is "conflict preemption": state law is preempted "when compliance with both state and federal law is impossible or when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 699, 104 S.Ct. 2694 (1984). The Supreme Court has reaffirmed its position that "in the absence of an express congressional command, state law is pre-empted if that law actually conflicts with federal law, or if federal law so thoroughly occupies a legislative field as to make reasonable the inference that Congress left no room for the States to supplement it." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516, 112 S.Ct. 2608 (1992).

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14 *Fifth Report and Order, Advanced Television Systems*, 12 FCC Rcd 12809 (1997), *on recon.*, 13 FCC Rcd 7417; *Sixth Report and Order, Advanced Television Systems*, 12 FCC Rcd 14588 (1997), *on recon.*, 13 FCC Rcd 6860 (1998); *Second Memorandum Opinion and Order on Reconsideration of the Fifth and Sixth Report and Orders*, 14 FCC Rcd 1348 (1998).

15 The FCC has previously set forth the following reasons for the accelerated time frame for DTV: (1) the desire for a free, universally available service rather than a paid service; (2) to spur American economy by promoting strength internationally; (3) offset disincentives that broadcasters may have to begin digital TV work; (4) ensure that recovery of broadcast spectrum occurs as quickly as possible. MM Docket No. 97-182, *In re Preemption of State and Local Zoning and Land Use Restrictions on the Siting, Placement and Construction of Broadcast Station Transmission Facilities.* The FCC deadline for the commencement of DTV service in the Denver market for the stations affiliated with ABC, CBS, FOX and NBC networks was November 1, 1999.

The conflict between the federal mandate to implement DTV and the actions taken by the County Commissioners is real and the preemption sought by Broadcasters is narrow. Congress has authorized the provision of a second television channel to every television station in the United States and mandated the transition to DTV by 2006 and the sale of returned frequencies for the financial benefit of the United States government. The Commission, pursuant to the Congressional mandate, has adopted a channel allocation plan which relies upon the allotment of adjacent television channels in a market and utilizes existing NTSC transmission sites as the proposed DTV sites, established deadlines for the commencement of DTV service and established criteria for the quality of DTV service to be provided. Jefferson County, in furtherance of its land use planning and in anticipation of the need of the Denver television stations to install DTV facilities, adopted and amended the Telecommunications Land Use Plan requiring tower consolidation, new television towers to accommodate a multiplexed FM antenna, the location of new towers in close proximity to other comparable structures and new towers on Lookout Mountain to be located on the eastern slope. Petition at 3-4. Jefferson County also tightened its Zoning Regulations to make continued use of existing towers more difficult and to prevent the addition of new antennas on existing towers. Petition at 4-5. It also modified the Planned Development Zoned District zoning mechanism to permit telecommunications towers pursuant to prescribed application requirements and criteria. Petition at 5.

Broadcasters do not contend that these zoning measures, *per se*, conflict with the federal mandate governing DTV. Rather, it is the County's failure to follow its own land use directives when it adopted the County Resolution which is wrong as a matter of fact and law and falls short of the reasoned decision making required to avoid that federal conflict.[16] Petition at 13-23. That the County Resolution conflicts with primary federal jurisdiction is uncontrovertible when one examines the finding that "the proposal does not demonstrate that the NIER emission levels set forth in the Zoning Resolution are met." County Resolution at ¶ 5. The emission levels set forth in the Zoning Regulations are the same as the FCC has adopted in its RFR guidelines for human exposure. 47 C.F.R. § 1.1310. Yet, the County ignored the fact the Commission has conditioned Broadcasters' DTV construction permits upon the Broadcasters "undertaking a comprehensive RF measurement survey once all transmitters are operational to demonstrate compliance with FCC FR exposure limits."

In addition to denying the zoning on the basis of the RFR issue, the County denied zoning due to the fact that LCG had not demonstrated that no alternate developed sites were available to accommodate the LCG antennas. County Resolution ¶ 5. LCG presented testimony to the County Commission that the tower could not be located at any of the alternate sites for various technological reasons, including the inability of equipment at the alternate sites to provide adequate

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16 If , as in the denial of zoning by Jefferson County, a local government decision appears on its face to lack reasoned decision making, the FCC should consider this as an additional unique circumstance in determining whether preemption is warranted.

coverage and service to the public in the Denver market.[17] The County's denial based on the existence of an alternate site for the tower (which would necessitate a corresponding loss in service) conflicts with the FCA and FCC policy requiring Broadcasters to provide service to the public. The FCC has the technical expertise to review the specifics relating to the alternate sites and determine whether LCG is able to provide the requisite service from such locations. LCG is confident that such a review will demonstrate the conflict between the zoning denial on the basis of alternate sites and federal regulation. Conflicts over issues such as RFR regulations and providing coverage from alternate sites are exactly the type of "conflicts" that justify preemption.[18]

The FCC has exercised preemption authority over local government zoning actions in the past without the benefit of explicit statutory direction. For example, in *In re 960 Radio, Inc.*, FCC 85-578 (1985), the FCC was asked to declare certain portions of a conditional use permit issued by a local zoning board to be void and unenforceable. The local board had imposed certain requirements regarding RFR interference on a radio station applying for a conditional use permit. The FCC found that "power in the area of radio frequency interference is exclusive; to the extent that any state or local government attempts to regulate in this area, their regulations are preempted" and held that the local zoning board was preempted

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17 For further discussion of the inadequacies of alternate sites due to technological reasons, *see, supra,* pages 8 – 18.

18 Jefferson County argues that "[n]o conflict exists in this case. There are no federal regulations that address where broadcasters must locate their facilities. Broadcasters are required to provide a certain quality of signal and to cover a certain percentage of population." Jefferson County Initial Comments at 14. It is exactly federal regulation regarding service and coverage that mandate the location of the tower and creates the conflict.

from imposing the RFR requirements in the conditional use permit. At the time the opinion was issued by the FCC, there was no statutory provision providing that local government regulation of RFR interference was specifically preempted by the federal government. The courts have also held that federal law has preempted the field of RFR interference regulation so that local government cannot make zoning decisions on the basis of RFR interference. *See, Freeman v. Burlington Broadcasters, Inc.*, 204 F.3d 311 (2nd Cir. 2000)(FCC preemption of RFR interference precluded town zoning board of adjustment from voiding permit to operate radio tower on grounds that signals were causing interference). *See also, infra,* cases cited at note 22.

3. Preemption Would Not Violate Due Process Rights

CARE argues that preemption by the FCC would violate Jefferson County citizens' due process rights. CARE Comments at 4. The basis for this contention is that "administrative procedures do not afford these citizens due process of law" and the public is denied the opportunity to testify at a further hearing. Id. The issuance of a declaratory ruling by the FCC does not violate due process rights. *See, F.C.C. v. WJR, The Goodwill Station*, 337 U.S. 265, 274, 69 S.Ct. 1097 (1949)(denial of petition for reconsideration by the FCC without according right of oral argument was not denial of due process). The FCC has the discretion to choose whether to proceed with a formal rulemaking or a declaratory ruling when making a decision on preemption. *New York State Commission on Cable Television v. FCC*, 669 F.2d 58, 62-63 (2nd Cir. 1982). CARE and members of the public are given

adequate opportunity in this public notice proceeding to file such comments as they wish and are not denied their rights to due process.

CARE also argues that the submission of the Browne Report by LCG to the FCC is a "violation of due process" as the report was not part of the record at the County Commission hearing. CARE Comments at 6. John Browne, LCG's expert, testified at the hearing that alternate sites were not suitable for a variety of technological reasons. The County Commission stated in its Resolution denying zoning that LCG failed to demonstrate that no alternate sites were available for the equipment. County Resolution ¶ 5. As this was a basis for denial of zoning, the subsequent Browne Report was submitted to the FCC and provided to the County and CARE to concisely provide information on the alternate sites and illustrate that the alternate developed sites are not feasible for technological reasons.[19] An "Alternative Analysis of DTV Tower Sites in the Denver Area" was filed with the FCC in response to the Browne Report by CARE. Neither the filing of the Browne Report nor the filing of the CARE analysis violate due process rights.

4. Deferral by FCC Based on Chairman Kennard's Letter.

CARE argues that the FCC should defer to the County because the FCC has deferred to local government in the past and because Chairman Kennard represented that the FCC's general policy was to defer to local regulation. CARE Comments at 18-20. Although the FCC has traditionally deferred to local

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[19] The County Zoning Regulations require a demonstration that the antennas for the proposed tower cannot be located on an existing telecommunications site. Zoning Regulations § 15(F)(b)(1). The Browne Report was submitted to show that existing telecommunications sites cannot house the antennas proposed for the LCG tower and that the LCG tower thus complied with § 15(F)(b)(1). *See, supra,* pages 7-18.